Nos. 273, 324

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NATIONAL LABOR RELATIONS BOARD, *Petitioners*

v.

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL 886, AFL-CIO

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

I. INTRODUCTION

This brief *amicus curiae* is submitted by the Chamber of Commerce of the United States of America with the

consent of parties as provided in Rule 42 (2) of the Rules of the Supreme Court.

II. INTEREST OF THE CHAMBER OF COMMERCE OF THE UNITED STATES

The Chamber of Commerce of the United States is a federation, consisting of membership of more than 3,000 national, local and state chambers of commerce and trade associations, with an underlying membership of approximately 1,700,000 business firms and a direct membership of more than 21,550 business firms. Many members are engaged in businesses in interstate commerce or in businesses whose activities affect interstate commerce and are, therefore, subject to federal laws that affect the employer-employee relationship in these businesses. This brief is filed because the issue involved here is of utmost importance to members of the Chamber of Commerce of the United States.

III. ARGUMENT

A. Statement

Amicus curiae contends that the issue before the Court in these two conflicting cases is whether a private organization, a labor union, may insist upon a clause in a collective bargaining agreement with an employer which gives the union the power and authority to engage in an illegal secondary boycott as otherwise prohibited by the National Labor Management Relations Act.

In case No. 273 involving the Teamsters union, there also is the question whether such agreements in labor-management contracts can give the employees of common carriers the right to discriminate among shippers, consignees, or other carriers by refusing to serve such shippers, consignees, or carriers as required by their obligations under the Interstate Commerce Act.

B. Private Contracts and the Law

The contract clauses involved in these cases are popularly known as "hot cargo" clauses. Common among the Teamster and Building Trades unions, such contract provisions permit unionized employees to refuse to do business with non-union workmen, and refuse to handle products which do not contain "proper" union labels to indicate they were made by employers who hire 100 per cent unionized labor. The contracts also are used to organize more workmen and to win strikes and labor disputes by involving neutral third parties in a union's dispute or organizing drive.

The use of "hot cargo" contracts came into general use following enactment of the 1947 amendments to the National Labor Relations Act when unfair labor practices for unions were established and secondary boycotts were made a violation of the act.

Before the establishment of unfair labor practices for unions, the National Labor Relations Board and the courts refused to permit employers to bypass the law by negotiating private contracts with their employees. Such private contracts were considered against public policy. As a general rule, all contracts or agreements which, directly or indirectly, involve or have for their object a violation of the law, are illegal.

In at least two instances this Court has had occasion to rule on contracts that were alleged to have conflicted with the national labor relations policy. In *J. I. Case Co.* v. *NLRB*, 321 U. S. 332, 88 L. Ed. 762, 64 S. Ct. 576 (1944); the Court upheld the National Labor Relations Board in declining to recognize as a defense to a refusal to bargain charge, a number of individual contracts negotiated prior to an attempt to gain a collective bargaining agreement. At page 339:

> "Wherever private contracts conflict with its [the NLRB] function, they obviously must yield or the Act would be reduced to a futility."

A similar holding was made in the earlier *National Licorice Co.* v. *NLRB*, 309 U. S. 350, 84 L. Ed. 799, 60 S. Ct. 569 (1940); where it was found that contracts between an employer and his individual employees whereby the employees agreed not to demand a closed shop or a collective bargaining contract, were invalid.

(1) Public Policy of Labor Law

The pillar of the National Labor Management Relations Act is Section 7, which guarantees an employee's right to join a labor union and, at the same time, guaranteeing the employee's "right to refrain from any or all of such activities". An employer who has become a party to a union "hot cargo" contract has agreed to stop doing business at some future, indefinite time with an unnamed employer whom the union regards as "unfair". "Unfair", to the professional unionist, frequently means an employer who declines to force compulsory union membership upon his employees or may mean an employer who refuses to accept an unreasonable demand. When "hot cargo" contracts are used, as many of them are, to compel employers, at the peril of their business to coerce the employees of another employer to join a labor union, the purpose of Section 7 is being thwarted. At page 337 in *J. I. Case* v. *NLRB*, *supra*, the Supreme Court declared:

> "Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement."

If contracts may not be used to forestall union membership, by the same token, they should not be used to

force union membership, where employees have exercised their rights under Section 7 by refraining from accepting union membership.

(2). Who is the Public?

In one of the legal opinions which upholds the legality of "hot cargo" secondary boycott contracts, there is the belief that Congress, in writing the National Labor Management Relations Act and in adopting Section 8 (b) (4), the so-called secondary boycott provisions, was mainly interested in protecting secondary employers. This is the view of Circuit Judge Bastian in the case now before the court, No. 273, *NLRB* v. *General Drivers*, 247 F2d 71, 40 LRRM 2047. He writes:

> "The Board urges that Section 8 (b) (4) (A) was enacted for the benefit of the public. We think that, although the public is involved, this section has for its purpose the protection of those persons who might be subjected to a secondary boycott, which is proscribed by the section."

But a careful reading of the Act and other decisions indicates that the intent of Congress goes far beyond protecting a secondary employer from the unfairness of a union secondary boycott—Congress had the general public in mind. Congress so said in writing the Act's Declaration of Policy:

> ". . . neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public . . . interest;
>
> ". . . to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."

In *National Licorice Co., supra*, Justice Stone discussed the public protection sought in the adoption of the earlier Wagner Act. At page 364:

"Here the right asserted by the Board is not one arising upon or derived from the contracts between petitioner and its employees. The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices. The public right and the duty extend not only to the prevention of his enjoyment of any advantage which he has gained by violation of the Act, whether it be a company union or an unlawful contract with employees, as the means of defeating the statutory policy and purpose. *Obviously employers cannot set at naught the National Labor Relations Act by inducing their workmen to agree not to demand performance of the duties which it imposes or by insisting, more than in a private litigation, that the employer's obedience to the Act cannot be compelled in the absence of the workers who have thus renounced their rights.*" (Italics ours)

The legislative history of the Taft-Hartley Act corroborates this continued attempt by Congress to protect the general public, not merely a secondary employer embroiled in a union unfair labor practice. On Page 8 of Senate Report No. 105, Part 1, April 17, 1947, 80th Congress, 1st Session, it was stated:

"Because of the nature of certain of these practices, especially . . . secondary boycotts . . . the committee is convinced that additional procedures must be made available under the National Labor Relations Act *in order adequately to protect the public welfare which is inextricably involved in labor disputes.*" (Italics ours)

* * * * *

"Hence, we have provided that the Board, *acting in the public interest and not in vindication of purely private rights*, may seek injunctive relief in the case of all types of unfair labor practices . . ." (Italics ours)

C. "Hot Cargo" Violates Section 8 (b) (4)

Before the adoption of the Taft-Hartley Act with its attempt to remove the double standards in labor law by establishing unfair labor practices for unions, the NLRB rightly refused to give effect to contracts, urged by employers, which the Board felt were contrary to the purposes of the Act. But when the first test came along in 1949, whereby a labor union sought by contract to evade the secondary boycott prohibitions of the new law, the NLRB upheld such an attempt. *Rabouin d/b/a Conway's Express* v. *NLRB*, 87 NLRB 972, enforced at 195 F2d 906 (1952).

Unfortunately the "hot cargo" principle in the case was dwarfed by other issues, and the dissenting opinion of the Second Circuit's holding even disregarded the "hot cargo" question. The majority opinion devoted but a paragraph to the "hot cargo" attempt to circumvent the new law. Not considering the public policy effect, the court held that "hot cargo" provisions were signed voluntarily by an employer and a union; therefore, there was no pressure upon employees to violate the Act.

Five years after this decision, the same circuit affirmed its earlier holding. *Milk Drivers Union* v. *NLRB*, 245 F2d 817, 40 LRRM 2279, (June, 1957).

In the meantime, however, other courts and the NLRB itself were beginning to refuse to follow the Second Circuit's view. In its *McAllister Transfer Co.* decision, 35 LRRM 1281 (1954), 110 NLRB 224, and *Local 1976, Brotherhood of Carpenters* (Sand Door), 113 NLRB 1210, 36 LRRM 1478 (1955); the Board specifically reversed its earlier *Conway* decision, holding that "hot cargo" boycott contracts were unenforceable and, consequently, no defense to a violation of section 8 (b) (4).

The Board's new view was affirmed by the Ninth Circuit in the *Local 1976 Carpenters* case, 241 F2d 147, 39 LRRM 2731. The Sixth Circuit in *NLRB* v. *Local 11, United Brotherhood of Carpenters*, 242 F2d 932, also followed the Ninth Circuit. At Page 936 the court remarked:

> ". . . the primary purpose of Congress in enacting Sec. 8 (b) (4) (A) was to protect the public interest from strikes or concerted refusals interrupting the flow of commerce at points removed from primary labor-management disputes. To allow the acquiescence of a single employer to validate conduct contrary to the express language of the statute would be to frustrate this Congressional purpose."

In fact the Court called attention to the view of an NLRB member that "hot cargo" contracts are contrary to public policy. Member Rodgers in his Sand Door opinion said:

> "No amount of ingenuity can change the simple fact that a 'hot cargo' contract is nothing more than a device to immunize in advance the very conduct which Congress in response to a dire public need sought effectively to eliminate. To permit a form of legal sophistry to make possible so flagrant a subterfuge for continuing this well-known abuse in labor disputes is to make a mockery of one of the most significant provisions which Congress wrote into the Act."

Others also have recognized the attempt by union officials to evade the law via "hot cargo" contracts. Writing in the *University of Cincinnati Law Review*, Vol. 23, No. 1, 1954, Page 53, Robert H. Wessel, an economics professor, and John A. Lloyd, Jr., of the Cincinnati bar both saw through the veil of "hot cargo":

> "The 'hot cargo' arrangement is nothing more than the old secondary boycott clothed in a new raiment of would-be respectability. But the sheep's clothing should not conceal the wolf from the eyes of the law."

But in the 2-1 decision by the Court of Appeals for the District of Columbia (NLRB v. General Drivers, 247 F2d 71, 40 LRRM 2047) one of the cases herein, the majority followed the Second Circuit's 1952 decision upholding the legality of the boycott contracts. But, Judge Prettyman in the dissent had no difficulty in seeing the violation in such contracts. He summed up his opinion:

> "In a nutshell my view is that the hot cargo clause cannot be enforced by a strike, because such a strike or refusal to work is flatly forbidden by Section 8 (b) (4) (A) of the Act."

He added that it may be that rights given in Section 8 (b) (4) (A) may not be nullified by contract and that Section 7 rights cannot be contracted away, but that he would not attempt to decide those questions.

But Congress specifically showed its intent not to permit a private contract to overrule the provisions it set out in Section 8 (b) (4). Section 10 (a) of the National Labor Management Relations Act reads:

> "The Board is empowered . . . to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. *This power shall not be affected by any other means of adjustment or prevention that has been established by agreement, law, or otherwise.*" (Italics ours)

Commenting on union contracts to violate Taft-Hartley, the NLRB trial examiner in the *Local 1976 Carpenters case, supra,* said:

> ". . . I would find that a labor organization may not immunize itself from the interdictions of Section 8 (b) (4) (A) in such fashion. I know of no other situation cognizable by the Board under the Act where private arrangements are given such wide and effective sweep in apparent derogation of public policy. Freedom to contract is precious, but not without circumscription familiar to the law."

Although the Second Circuit is quoted as the primary authority for the legality of hot cargo boycott contracts because of its two earlier decisions, a decision as recent as October 2, 1957, indicates that this circuit may also want to reconsider its earlier findings. Asked to review a lower court injunction based on a hot cargo secondary boycott, Judge Moore in *Douds* v. *Milk Drivers Union*, — F2d —, 40 LRRM 2669; seems to express doubt at Page 2672 on "hot cargo" contracts, although he says the question was not before the court at that time:

> "To what extent employers and labor unions may by agreement modify or nullify (if at all) the laws enacted by Congress for the protection of the public is a question not presently before us."

A colleague, however, would go farther and examine the full question. In a concurring opinion, Judge Lumbard suggests the court "critically reexamine" its hot cargo decisions, explaining that they . . .

> "seem to me to be contrary to both plain statutory language and the intent of the Congress. . . . *If Congress intended to protect the public and, in the case of Sec. 8 (b) (4) (B) of the Labor Management Relations Act of 1947, primary employers, from the effect of secondary boycotts, and I believe it did so intend, other parties cannot insulate themselves by contract from such statutory prohibitions.*" (Italics ours)

(1) District Court Decisions

The weight of district court decisions on the granting of NLRB injunctions to stop hot cargo secondary boycotts outweighs district courts' refusing to enjoin the practices. Two of the more detailed district court opinions reveal:

Douds v. *Milk Drivers Local*, 133 F. Supp. 336; 36 LRRM 2410 (1955):

> "Then both the union and the secondary employer, by entering into this 'hot cargo' clause contract, *will*

have contracted to nullify the very protection of the public which the Taft-Hartley Act was designed to afford. It follows that if the 'hot cargo' clause thus violates in essence this important provision and intention of the statute, such clause is contrary to public policy and void." (Italics ours)

* * * *

Alpert v. *Carpenters Union*, 143 F. Supp. 371, 38 LRRM 2420 (1956):

". . . The fact among other circumstances, that the injunctive right is given to the Board, and not to the individual employer, indicates to me that *the protection is intended for more than that employer* . . . The public at large, particularly where interstate commerce is involved, is interested in not having strikes extend far afield." (Italics ours)

* * * *

District Court decisions in *Roumell* v. *Plumbers Local*, 151 F. Supp. 706, 40 LRRM 2104, (1957); *LeBuss* v. *General Drivers, Local 984*, 40 LRRM 2635, (Sept. 14, 1957); and *Madden* v. *Teamsters*, 114 F. Supp. 459, 38 LRRM 2190 (1956), also hold with decisions against hot cargo clauses.

D. Interstate Commerce Act Violation

When Local 886 of the Teamsters union induced its members to refuse to handle interstate freight shipments brought by the American Iron and Machine Works Co. to the terminals of the five truck lines operating as common carriers under authority of the Interstate Commerce Commission, the obligation of the Interstate Commerce Act to serve all shippers without discrimination was breached. 49 USCA 316. A common carrier and its employees have the legal duty to serve all shippers, consignees, or connecting carriers without discrimination or partiality.

"The transportation employee, rail or motor, is charged with duties to the industry, to the shipper

and to the public. The loyalty of the employee to the carrier, rail or motor, is inherent in his job, just as loyalty to the government prevents interruption to the public business in federal employment." *Montgomery Ward* v. *Northern Pacific Terminal Co.*, 128 F. Supp. 475 *at* 500, 32 LRRM 2386 (1953).

When unions representing employees in the interstate transportation industry urge "hot cargo" clauses, which give the union the power to dictate who should be permitted to ship on the nation's highways, they are violating the law. They may not successfully contend that the National Labor Management Relations Act permits collective bargaining agreements that nullify the Interstate Commerce Act. The court in *Montgomery Ward* v. *Northern Pacific Terminal Co.*, *supra* particularly emphasized the obligation of a common carrier to serve the public impartially. At Page 494:

> "The suggestion that these obligations have been abrogated or essentially modified by statute law or policy is unthinkable. In the preservation of these obligations, the public at large—not any class or clique—is vitally concerned. Indeed, the nation will not long survive their destruction."

State tribunals also have recognized that Teamster "hot cargo" contracts are violations of free interstate commerce. In *Drivers Union* v. *American Tobacco Co.*, 264 SW 2d 30, 32 LRRM 2259 (1953), the Kentucky Court of Appeals held:

> "The rule of law that *common carriers and their employees must serve all members of the public without discrimination* is firmly established in Kentucky, and so far as we can find, in all states. Its origin goes back into the common law."
>
> "*The legal duty of a common carrier* to handle the merchandise of a shipper without discrimination *existed long before the contract* came into being, *and, by like token, employees of common carriers*, as long as they voluntarily remain in the hire of their employer, *do not have the lawful right to withhold their*

services from a particular customer who deals with their employer." (Page 2263) (Italics ours)

The Tennessee Court of Appeals in their 1956 decision in *Aladdin Industries v. Associated Transport*, 298 SW 770, 38 LRRM 2559; held:

> "Appellants rely on the provisions of the collective bargaining contract above quoted. That merely said it would not be a breach of the contract if an employee refused to go through the picket line of a union or to handle 'unfair' goods. *That contract could not bind third persons or affect the rights of the public, the contract would be illegal and void.*" (Italics ours)[2]

This Court had occasion to rule on the question of private contracts as an interference with the free movement of interstate commerce. Although the cases cited herein primarily concern violations by carriers, the principle of not permitting private contracts to supersede the Interstate Commerce Act is the same whether a carrier voluntarily signs such an agreement or whether a union, representing the carriers' employees, forces such a contract.

More than 45 years ago this Court refused to enforce a contract by a carrier for free passenger service given in exchange for a release for personal injury claims against the carrier. In *Louisville & Nashville Railroad Co. v. Erasmus L. Mottley*, 219 U. S. 467, 55 L. Ed. 297, 31 S. Ct. 265 (1911); Justice Harlan declared:

> "There is no provision excepting special contracts from the operation of the law".

In *U.S. v. Pennsylvania Railroad Co.*, 323 U. S. 612, 98 L. Ed. 499, 65 S. Ct. 471 (1945); the Court held that

[1] This Court at 348 U. S. 978, 75 S. Ct. 563, 99 L. Ed. 762 (1955) reversed the decision, the reversal was on jurisdictional grounds and not on the interpretation of the law.

[2] Reversed on jurisdictional grounds. McCrary et al. v. Aladdin Industries, Inc., 355 U. S. ____, 10 LRRM 2679 (Oct. 14, 1957)

railroads could not refuse to establish certain joint through rail-water routes with a car ferry service carrying freight between Brooklyn and New Orleans. The refusal was the result of a rule promulgated by what is now known as the Association of American Railroads because of rail-water competition over this particular route. Here we have the Teamsters, fearing competition from carriers whose men do not want to join their union, insisting that union carriers not do business with shippers who are in the midst of a labor dispute or whose employees may not want to join a labor organization.

In a third decision, the Supreme Court held in *U. S. v. Baltimore & Ohio Railroad Co.*, 333 U. S. 169 @ 175, 92 L. Ed. 618, 68 S. Ct. 494 (1948):

> "It would be strange had this legislation left a way open whereby carriers could engage in discrimination merely by entering into contracts for the use of trackage. In fact this court has long recognized that the purpose of Congress to prevent certain types of discriminations and prejudicial practices could not be frustrated by contracts."

It is obvious that no private contract, regardless of its purpose, can be used to frustrate the intent of the Interstate Commerce Act to discriminate among the users of interstate commerce. Because union "hot cargo" contracts are designed to prevent the public from using the normal transportation avenues of interstate commerce, they should be struck down without further delay.

As recently as November 13, 1957, the NLRB decided that union "hot cargo" contracts with common carriers are invalid *per se* under the National Labor Management Relations Act. *Truck Drivers and Helpers Local Union 728 et al. v. Genuine Parts Co.*, 119 NLRB No. 53. The principal opinion in the Board's decision points out that under the Interstate Commerce Act carriers and their employees are not free to decide, at will, to withhold their services to a particular customer or class of customers.

". . . it is not our intent, in making reference to the provisions of the ICA to judge the actions of the common carriers subject to the ICA. Our purpose is narrowly limited and can be summarized as follows: We have been commissioned by the Supreme Court not to ignore the other and equally important statutory schemes in administering our statute. The carriers before us are subject to the ICA—a scheme designed, like ours, to facilitate the flow of commerce . . ."

"We are satisfied, on the basis of the legislative history of the Act as it throws light on the objectives of the Congressional scheme embodied in Section 8 (b) (4) of the (Taft-Hartley) Act, that the 'hot cargo' contracts here involved are repugnant to the basic policies of the Act and in conflict with the public rights this Board is under a duty to protect."

IV. SUMMARY OF ARGUMENT

In the words of the late Senator Taft, the intent of Congress when it enacted the 1947 National Labor Management Relations Act was to bring an end to all secondary boycotts by labor unions. During the course of legislative debate on the measure, Senator Taft at 93 Cong. Rec. 4198, 1st Session (April 29, 1947) declared:

"Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provisions dealing with secondary boycotts so as to make them an unfair labor practice."

It is the contention of *amicus* that a union may not use a collective bargaining contract to nullify the Act's intent to protect the public from secondary boycotts. Such contracts which contain "hot cargo" clauses not only violate public policy as established by the Act, but breach its Section 8 (b) (4) prohibitions.

In regard to case No. 273 before this court, *amicus* urges that the Court find the Teamsters union failed in

its duty to comply with provisions of the Interstate Commerce Act as well as the Labor Management Relations Act. The result of "hot cargo" clauses in labor-management agreements is to restrict and burden the free movement of interstate commerce. In some instances the result is to cut off all commerce for certain shippers, consignees, or carriers who happen to incur the wrath of a Teamster union official.

We urge that this Court go beyond the limited findings of the National Labor Relations Board which holds that "hot cargo" contracts are no defense to a violation of Section 8 (b) (4); and that such contracts are illegal *per se* only when made by a union and a common carrier. In our view, such contracts, in whatever industry they exist, not only fail to offer a defense to a violation of the law, but the very making of such contract is objectionable to the purposes of the National Labor Management Relations Act. This Court should declare them invalid *per se*.

V. CONCLUSION

For the reasons stated, we respectfully submit that "hot cargo" provisions in collective bargaining agreements are contrary to public policy, and in violation of both the National Labor Management Relations Act and the Interstate Commerce Act.

We ask that this Court reverse the United States Court of Appeals for the District of Columbia Circuit in case No. 273, and hold that the so-called "hot cargo" clause in a labor-management collective bargaining contract is in violation of public policy and the law. In case No. 324 we ask that this Court make clear that no employer or labor organization have the legal right to enter into collective bargaining contracts that include clauses providing for a built-in secondary boycott, and that such clauses, whether they masquerade as "hot cargo," "standard form

of agreement," or involve any such principle, be declared illegal *per se*.

Respectfully submitted,

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PROOF OF SERVICE

I, William B. Barton, one of the attorneys for the movants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the —— day of December, 1957, I served copies of the foregoing BRIEF AMICUS CURIAE on the several parties to the principal case as follows:

1. On the appellants, National Labor Relations Board, by mailing a copy in a duly addressed envelope with first class postage prepaid to the Office of the Solicitor General: J. Lee Rankin, Solicitor General, Washington 25, D. C.

2. On the appellants, Local 850, International Association of Machinists, AFL-CIO, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to their attorney of record: Plato E. Papps, 1300 Connecticut Avenue, N. W., Washington 6, D. C.

3. On the appellees, General Drivers, Chauffeurs, Warehousemen and Helpers Union, Local 886, AFL-CIO, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to their attorney of record: Herbert S. Thatcher, 1009 Tower Building, Washington 5, D. C.

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William B. Barton